

STATE OF MICHIGAN
COURT OF APPEALS

RONALD E. NUNN, doing business as PROTREE
NURSERIES,

UNPUBLISHED
March 23, 2004

Plaintiff-Appellee,

v

HILLTOP NURSURIES, L.L.C., ARCADIA
BIDCO CORPORATION, and RONALD J.
BIEKE,

No. 245511
Kalamazoo Circuit Court
LC No. 01-000493-CZ

Defendants-Appellants.

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right the judgment for plaintiff. We affirm in part, reverse in part, and remand.

I. Facts and Procedure

Defendant Hilltop Nurseries, L.L.C. (Hilltop), a distributor of fruit trees, purchased trees from plaintiff, a nursery, for delivery in 2000 and 2001. When a dispute arose regarding the sale, the parties entered a settlement agreement on March 16, 2001, in order to avoid litigation. In ¶ 2 of the agreement, the parties agreed that Hilltop owed plaintiff \$145,926.96 for the trees delivered in 2000. In ¶ 3 of the agreement, Hilltop agreed to pay plaintiff \$326,173.25 for trees delivered in 2001. The following terms of the agreement governed payment, a discount, and attorney fees:

8. Discount. In consideration of the execution of this Agreement and the Guarantees and payment in full of the obligations set forth in Paragraph 9 herein, ProTree shall then issue a credit to Hilltop against the sums owed and described in Paragraphs 2 and 3 of \$100,000.00. Upon request by Hilltop, a separate credit invoice shall be prepared and delivered to it.

9. Payment. Hilltop agrees to pay and ProTree agrees to accept subject to the terms of this Agreement the net sum of \$372,100.21 in full payment of all sums owed. Hilltop shall pay said sums by making six (6) equal monthly payment[s] of \$62,016.70 with the first payment due upon the execution of this

Agreement and Guarantees. The next five (5) payments shall be made in 30-day increments. ProTree is entitled to interest at one percent (1%) per month on the unpaid balance commencing on any balance that exists under this Agreement if the payments set forth in this paragraph are not paid.

10. Attorneys' Fees and Costs. In the event of a breach of the terms of this Agreement, the prevailing party in an action or lawsuit by reason hereof shall be entitled to reasonable attorneys' fees, costs and damages incurred by the prevailing party.

Defendant Ronald Bieke, personally and as President of defendant Arcadia Bidco Corporation, signed Guaranty Agreements guaranteeing that the payments set forth in the settlement agreement would be made.

When defendants failed to make the final two payments of \$62,016.70, plaintiff filed suit, alleging that Hilltop breached the agreement by failing to make all of the payments, and Arcadia Bidco and Bieke failed to honor their guarantee agreements. Plaintiff claimed that defendants were liable for \$124,033.40 for the remaining two payments under the agreement, \$100,000 for the discount that no longer applied, interest, and attorney fees. The trial court granted plaintiff summary disposition on the guarantees for the final two payments, totaling \$124,033.40. However, the trial court concluded that the agreement language was ambiguous as it related to the discount, so plaintiff was not entitled to summary disposition regarding his claim for the \$100,000 discount.

After a bench trial regarding plaintiff's claim for the \$100,000 discount, the trial court concluded that defendants were not entitled to the discount under the agreement, because ¶¶ 8-9 of the agreement required defendants to timely make all of the monthly payments to receive the discount. Accordingly, the trial court determined that plaintiff was entitled to the remaining \$100,000 owed under the settlement agreement. The trial court then entered a partial judgment for plaintiff for the \$100,000 discount, \$17,203.73 in interest, \$174.41 in costs, and \$4,705.41 in attorney fees (a total of \$122,083.55).

II. Analysis

A. The Discount Under the Settlement Agreement

Defendants argue that the trial court clearly erred in determining that, in addition to being liable for \$124,033.40 for failing to make the last two payments under the settlement agreement, they were required to pay plaintiff \$100,000 because they were not entitled to the agreement's discount. Defendants do not dispute the trial court's determination that the agreement was ambiguous in regard to their entitlement to the \$100,000 discount, but argue that the total amount they owed under the agreement was \$372,100.21, and that the trial court allowed plaintiff to unilaterally modify the settlement agreement to increase the damages and awarded plaintiff exemplary damages not contemplated by the agreement. We disagree. "It is well settled that the

meaning of an ambiguous contract is a question of fact that must be decided by the jury.” *Klapp v United Ins Group Agency*, 468 Mich 459, 469; 663 NW2d 447 (2003).¹ The trial court’s findings of fact may not be set aside unless they are clearly erroneous. MCR 2.613(C); *Westlake Transportation, Inc v Public Service Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003). “A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made.” *Id.*

“Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract’s terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning.” [*Klapp, supra* at 469, quoting 11 Williston, Contracts (4th ed), § 30:7, pp 87-91.]

Here, the settlement agreement states that Hilltop owed plaintiff \$145,926.96 for trees delivered in 2000 and \$326,173.25 for trees delivered in 2001. Therefore, Hilltop owed plaintiff a total of \$472,100.21 under the agreement. The discount provision of the settlement agreement provides, “In consideration of the execution of this Agreement and the Guarantees and payment in full of the obligations set forth in Paragraph 9 herein, ProTree shall then issue a credit to Hilltop against the sums owed and described in Paragraphs 2 and 3 of \$100,000.00.” Paragraph nine states that Hilltop must fully pay plaintiff \$372,100.21 in six equal monthly payments made in thirty-day increments. When read together, these provisions could reasonably be construed to mean that Hilltop was obligated to pay \$372,100.21 only if it fully paid this amount in the six timely monthly payments set forth in ¶ 9. But if Hilltop failed to comply with the payment provisions of ¶ 9, it was obligated to pay the full \$472,100.21. Thus, Hilltop was only entitled to the \$100,000 discount under ¶ 8 if it made the six monthly payments required by ¶ 9. As explained by the trial court, accepting defendants’ argument that the total amount due was \$372,100.72 would require the court to ignore ¶¶ 2-3, and 8 of the agreement. “A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all its provisions.” *Deboer v Geib*, 255 Mich 542, 544; 238 NW 226 (1931). Defendants have not shown that the trial court clearly erred in finding that the agreement required them to timely make all of the monthly payments required by ¶ 9 in order to receive the \$100,000 discount and pay a total of \$372,100.72. Because defendants did not timely make the monthly payments, they owed plaintiff \$472,100.72 and are liable for the additional \$100,000 under the agreement.

B. Attorney Fees

Defendants also argue that the trial court erred in awarding plaintiff attorney fees, because there was no evidence submitted at trial supporting an award of attorney fees, the trial

¹ Because defendants do not dispute the trial court’s conclusion that the agreement was ambiguous in regard to the discount provision, we will assume for purposes of this appeal that this ambiguity existed in the agreement.

court did not award attorney fees in its opinion and order, and plaintiff did not properly present the judgment awarding attorney fees to the trial court for signing. The agreement includes the following provision regarding attorney fees: “In the event of a breach of the terms of this Agreement, the prevailing party in an action or lawsuit by reason hereof shall be entitled to reasonable attorneys’ fees, costs and damages incurred by the prevailing party.” However, plaintiff concedes that it did not present evidence at trial supporting the award of attorney fees and the trial court did not award attorney fees in its opinion and order. Plaintiff also does not contest defendants’ claim that the judgment was not properly entered pursuant to MCR 2.602(B) and that defendants had no chance to object to the attorney fees included in the judgment. Therefore, we vacate the judgment and remand to the trial court to enter a judgment for plaintiff without attorney fees.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Bill Schuette